

CASE NOTE

*WILLIAMS v COMMONWEALTH**

**COMMONWEALTH EXECUTIVE POWER
AND AUSTRALIAN FEDERALISM**

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A majority of the High Court in Williams v Commonwealth held that the Commonwealth executive does not have a general power to enter into contracts and spend public money absent statutory authority or some other recognised source of power. This article surveys the Court’s reasoning in reaching this surprising conclusion. It also considers the wider implications of the case for federalism in Australia. In particular, it examines: (1) the potential use of s 96 grants to deliver programs that have in the past been directly funded by Commonwealth executive contracts; and (2) the question of whether statutory authority may be required for the Commonwealth executive to participate in inter-governmental agreements.

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I INTRODUCTION

Since Federation, the scope of the Commonwealth executive power in s 61 of the *Constitution* has been an unsolved mystery. Many assumed that, at the very least, the power extended to the subject matters of enumerated heads of Commonwealth legislative power within the *Constitution*. It had also been assumed that the executive did not require any specific statutory authority to engage in activities relating to those subject matters. Over time, these assumptions have formed the basis for Commonwealth direct spending programs implemented through executive contracts between the Commonwealth and private parties. These executive contracts now account for somewhere between 5 and 10 per cent of all Commonwealth expenditure¹ and, until recently, had been used to implement a broad range of Commonwealth policy objectives without the support of legislative authority.

In *Williams v Commonwealth* ('*Williams*'),² the High Court exploded these assumptions regarding the scope of federal executive power. The case turned on the validity of an agreement entered into between the Commonwealth and a private company that provided 'chaplaincy services' in a Queensland state school. By a 6:1 majority, with Heydon J dissenting, the Court held that executive power is not coextensive with legislative power and concluded that, in most circumstances, the Commonwealth executive requires statutory

¹ Joe Kelly and Nicola Berkovic, 'Urgent Move to Close Loophole and Keep Chaplains in Schools', *The Australian* (Sydney), 26 June 2012, 4.

² (2012) 288 ALR 410.

authority before it can enter into contracts with private parties and spend public money.³

The majority dismissed the Commonwealth's submission that the capacity of its executive to contract was effectively unlimited. French CJ, Gummow and Bell JJ, and Crennan J also rejected a narrower submission by the Commonwealth. That submission contended that the executive was empowered to enter into contracts on matters that *could* be the subject of legislation, even if no such legislation had been enacted. In rejecting this, they drew heavily on principles of federalism and a concern that the grant-making power in s 96 of the *Constitution* could be 'bypassed' by the Commonwealth if it could contract without legislative authority.⁴

Hayne J and Kiefel J did not find it necessary to determine the correctness of this narrower submission since, in their view, the *Constitution* did not empower the legislature to enact a statute in support of the chaplaincy program.⁵ They did, however, emphasise concerns over the potential widening of Commonwealth legislative powers by way of an unlimited executive power operating in combination with the incidental legislative power contained in s 51(xxxix) of the *Constitution*.⁶

This case note examines the reasoning put forward by the High Court in *Williams*, highlighting in particular the strong federal themes central to many of the judgments. It then turns to the implications of the decision for Australian federalism. It explores the Commonwealth's response to the decision and examine what this might mean for future use of the grant-making power in s 96. Finally, it considers the implications for a key component of cooperative federalism in Australia, the making of intergovernmental agreements by the Commonwealth.

II BACKGROUND

In 2006, the Commonwealth created a funding scheme known as the National School Chaplaincy Programme ('NSCP'). Under the NSCP, Australian schools were eligible to apply for financial support from the Commonwealth to

³ For exceptions, see *ibid* 413 [4], 417 [22], 422 [34] (French CJ), 537–8 [484]–[485] (Crennan J), 559–60 [582]–[583] (Kiefel J).

⁴ *Ibid* 423 [37], 433 [60]–[61] (French CJ), 455 [143] (Gummow and Bell JJ), 542 [501], [503] (Crennan J).

⁵ *Ibid* 463 [183], 488 [272], 491 [285]–[286] (Hayne J), 556 [569], 557 [572]–[573], [575] (Kiefel J).

⁶ *Ibid* 481 [242] (Hayne J), 559 [581] (Kiefel J).

establish or enhance an existing programme by which ‘chaplaincy services’ would be provided within the school. No statute was enacted for the creation, administration or funding of the NSCP. Rather, the Commonwealth relied entirely on its executive power in s 61 of the *Constitution* for the authority to conduct the programme.

The Commonwealth’s initiative had precedents at state and territory level. In 1954, Victoria was the first to appoint chaplains to its schools. Western Australia, South Australia, the Australian Capital Territory, Tasmania and Queensland followed in the 1980s and 1990s.⁷ Queensland, in which the plaintiff’s four children were receiving their education at the Darling Heights State Primary School (‘School’), set down guidelines for the provision of chaplaincy services in its public schools in 1998. There had been a chaplain intermittently at the School since that time, but a regular two-day per week appointment was made in April 2006. That position was supported through a contract between the State of Queensland and Scripture Union Queensland (‘SUQ’). SUQ was a public company that provided chaplains in pursuit of its objects ‘to make God’s Good News known to children, young people and their families’ and ‘to encourage people of all ages to meet God daily through the Bible and prayer’.⁸

In April 2007, the School sought funds under the NSCP to extend the number of days its chaplain was available to students. That application was successful and, in November 2007, the Commonwealth entered into an agreement (‘Funding Agreement’) with SUQ in accordance with the guidelines established for the NSCP. Pursuant to the Funding Agreement, SUQ provided chaplaincy services to the School for three years commencing 8 October 2007, and in return received four payments totalling \$93 063.01 drawn from the Commonwealth Consolidated Revenue Fund. In total, in 2010, SUQ received \$781 000 from the State of Queensland for the provision of chaplaincy services across that State’s schools. In consideration for its services provided under the Commonwealth’s NSCP in the same year, SUQ received \$11 012 000.

Mr Williams, desiring a secular education for his children,⁹ commenced proceedings in the High Court challenging the validity of the Funding

⁷ Judith Anne Salecich, *Chaplaincy in Queensland State Schools: An Investigation* (PhD Thesis, The University of Queensland, 2001) 1 <<https://espace.library.uq.edu.au/view/UQ:184700>>.

⁸ *Williams* (2012) 288 ALR 410, 414 [6] (French CJ).

⁹ ABC Television, ‘Campaign against Chaplaincy Program Reaches High Court’, 7.30, 10 August 2011 (Ronald Williams) <<http://www.abc.net.au/7.30/content/2011/s3290571.htm>>.

Agreement and related expenditure of public monies. The initial focus of the proceedings was on whether the NSCP imposed a religious test for a Commonwealth office, contrary to s 116 of the *Constitution*. However, in oral argument,¹⁰ and ultimately also in the Court's reasons for judgment, the freedom of religion issue assumed only minor importance. Similarly, other matters concerning the plaintiff's standing to bring the case and whether there had been a valid appropriation of the funds proved not to be decisive. Instead, the case turned on the scope of executive power pursuant to s 61 of the *Constitution*. The critical question was whether that executive power was sufficiently broad, in the absence of statutory authority, to empower the Commonwealth to enter into the Funding Agreement and make payments under it.

An important dimension to the case was that oral argument before the High Court proceeded in an unusual manner. Initially, all the parties, including each of the intervening States (Queensland, New South Wales, Tasmania, South Australia, Victoria and Western Australia), made written submissions that proceeded on the basis of a commonly held assumption that the scope of the Commonwealth executive power under s 61 was at least coextensive with the Commonwealth's legislative heads of power in ss 51, 52 and 122 of the *Constitution*.¹¹ A central aspect of this assumption was that the Commonwealth executive did not require statutory authorisation to enter into contracts and spend money so long as the subject matter was one on which the Commonwealth legislature *could* validly pass legislation. However, during the course of the first day of oral argument, French CJ raised questions about the basis of the assumption. He accepted the Commonwealth's submission that the express grants of Commonwealth legislative power were an 'envelope limiting the exercise or the breadth of the executive power'.¹² However, he observed that this was not the same as suggesting that the scope of Commonwealth executive power extended to anything that could be the subject of Commonwealth legislation.¹³

In response, Western Australia, Victoria and Queensland withdrew their support for the commonly held assumption and the plaintiff and other State interveners shortly followed suit. This left the Commonwealth alone in

¹⁰ See, eg, Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 200 (11 August 2011) 7850–2 (French CJ).

¹¹ *Williams* (2012) 288 ALR 410, 502–3 [341]–[345] (Heydon J).

¹² Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 198 (9 August 2011) 2426.

¹³ *Ibid* 2433–4.

defending what had previously been assumed. As Heydon J rather dramatically put it, the Court was cast onto ‘a darkling plain, swept with confused alarms of struggle and flight, where ignorant armies clash by night — although the parties were more surprised than ignorant’.¹⁴ The remainder of the oral argument and the subsequent written submissions proceeded on the basis that the scope of the Commonwealth executive power in the absence of statutory authority was very much in contention.

III PRELIMINARY ISSUES

While the case hinged on the scope of executive power under s 61 of the *Constitution*, the Court also addressed issues relating to the plaintiff’s standing, his challenge to the Funding Agreement under s 116 of the *Constitution*, and the contention that there was no valid appropriation from which Funding Agreement payments were made. The Court dealt with each of these issues briefly.

A Standing

With respect to Mr Williams’ standing to challenge the validity of the Funding Agreement and the expenditure under it, the majority held that the issue could be set aside since the plaintiff’s case was supported in full by Victoria and Western Australia and in part by the other State interveners. As each State itself possessed the standing to mount the challenge, there was no need to determine whether Mr Williams also did.¹⁵ Heydon J found that Mr Williams had standing to challenge the Funding Agreement. However, he held that this derived from the payment made to SUQ for the 2010–11 period, since that payment had been made while Mr Williams’ children were in attendance at the School and the services under the Funding Agreement were still being performed at the time the proceedings were commenced.¹⁶

In recent decisions, the Court has adopted a more permissive approach towards standing, loosening the general rule that the plaintiff must show a ‘special interest’ in the subject matter of proceedings.¹⁷ In *Pape v Commission-*

¹⁴ *Williams* (2012) 288 ALR 410, 503 [343].

¹⁵ *Ibid* 414 [9] (French CJ), 447 [111]–[112] (Gummow and Bell JJ), 460 [168] (Hayne J), 536 [475] (Crennan J), 553 [557] (Kiefel J).

¹⁶ *Ibid* 499–501 [327]–[330] (Heydon J).

¹⁷ *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 527 (Gibbs J); *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 42 where Stephen J explained that ‘special

er of Taxation ('Pape'),¹⁸ the plaintiff sought to challenge the lawfulness of a payment due to be made to him under the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) ('*Tax Bonus Act*'). The Commonwealth, joined as a defendant, conceded that the plaintiff had standing to challenge the specific payment made to him but contended that he lacked a special interest in the validity of the entire *Tax Bonus Act* and the payments being made under it to other eligible persons. In rejecting this contention, the majority restated the principle that questions of standing are subsumed within the broader question of whether there is federal jurisdiction with respect to a 'matter'.¹⁹ The validity of the specific provision within the *Tax Bonus Act* pertaining to the plaintiff's payment was considered inseverable from the remainder of the Act, and a declaration as to the validity of the entire Act was therefore a necessary step in determining the specific matter raised by the plaintiff.²⁰ Although it has been suggested that the High Court in *Pape* came close to recognising a general concept of 'public interest standing',²¹ it was at least clear in that case that a determination as to the validity of the Act was a necessary aspect of determining the validity of the payment made to the plaintiff.

In *Williams*, the majority of the Court was content to take the unusual step of bypassing the question of the plaintiff's standing altogether, concluding that the standing of the States was sufficient for the case to proceed. This approach is incongruous with the notion expressed repeatedly in ch III of the *Constitution* that there needs to be a 'matter' before the Court²² — the plaintiff, not the intervening states, has instituted the proceedings, and if the plaintiff lacks standing the states have no matter in which to intervene.²³

The Court's holding on standing was not the subject of detailed reasoning or analysis. It might be based on the view that while the 'special interest' test may be appropriate where the impugned conduct imposes duties on individuals, it is ill-suited to a public law context. It would fail 'to keep modern federal

interest' is not a mechanical test, but one that requires an assessment of the importance of the subject matter to the plaintiff and the plaintiff's closeness to that subject matter.

¹⁸ (2009) 238 CLR 1.

¹⁹ *Ibid* 35 [50]–[51] (French CJ), 68 [152] (Gummow, Crennan and Bell JJ), 99 [273] (Hayne and Kiefel JJ).

²⁰ *Ibid* 36 [52] (French CJ), 69 [157]–[158] (Gummow, Crennan and Bell JJ), 99 [273] (Hayne and Kiefel JJ), 138 [401] (Heydon J).

²¹ Peter Johnston, 'Pape's Case: What Does It Say about Standing as an Attribute of "Access to Justice"' (2010) 22(3) *Bond Law Review* 16, 34 n 75.

²² *Constitution* ss 73, 75–8.

²³ See *Williams* (2012) 288 ALR 410, 499 [326] (Heydon J) for a discussion of the Commonwealth Solicitor-General's submission on this point.

government within its powers when it regulates conduct by expenditure, intergovernmental agreements, codes of conduct and licensing agreements, which by their very nature are likely to lack the direct effect on rights and interests required by the traditional law of standing.²⁴ In any event, and for whatever reason, it appears that the current Court is unlikely to allow standing to be an obstruction in cases that raise fundamental questions as to the constitutional structure of the nation.

B Section 116

Among the several prohibitions contained in s 116 of the *Constitution* is the edict that ‘no religious test shall be required as a qualification for any office or public trust under the Commonwealth.’ The plaintiff contended that the NSCP Guidelines offended this aspect of s 116 since they required that, to qualify as appointment as a chaplain, a person must be recognised ‘through formal ordination, commissioning, recognised qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service’.²⁵ The Court unanimously dismissed this argument. In their joint judgment, Gummow and Bell JJ,²⁶ with whom the majority agreed,²⁷ held that the argument failed at the threshold. The chaplains engaged by SUQ did not hold an office under the Commonwealth. The Commonwealth had not entered into any contractual or other arrangement directly with the chaplains. Instead, those individuals were engaged by SUQ to provide services under the control and direction of the school principal.

Heydon J, reaching the same conclusion, was of the view that the duties of chaplains detailed in the NSCP Guidelines, and as further stipulated in the School’s application for funding, conveyed the impression that ‘neither the NSCP nor the qualification for “chaplains” had much to do with religion in any specific or sectarian sense.’²⁸ He suggested that ‘those supporting validity committed an error in calling the NSCP a “chaplaincy program” and speaking of “school chaplains” — this language was ‘inaccurate and may have been counterproductive’ since it attracted challenge under s 116.²⁹ Upon examina-

²⁴ Simon Evans, ‘Standing to Raise Constitutional Issues’ (2010) 22(3) *Bond Law Review* 38, 49 (citations omitted).

²⁵ *Williams* (2012) 288 ALR 410, 446 [107] (Gummow and Bell JJ).

²⁶ *Ibid* 446–7 [108]–[110].

²⁷ *Ibid* 415 [9] (French CJ), 460 [168] (Hayne J), 537 [476] (Crennan J), 562 [597] (Kiefel J).

²⁸ *Ibid* 495 [306].

²⁹ *Ibid* 495 [307].

tion, he held that the program did not offend s 116 for reasons similar to those given by the majority.³⁰

C Validity of Appropriation

In addition to challenging the validity of the Funding Agreement, the plaintiff also sought to challenge the payments made to SUQ on the basis that they had not been validly appropriated. He argued that the relevant Appropriation Acts³¹ did not refer to the NSCP as a new policy to be implemented. In response, the Commonwealth contended that the plaintiff lacked standing to challenge the appropriation of funds. The majority of the Court appeared to agree,³² while Heydon J was unequivocal that the plaintiff lacked standing since the appropriation from which the funding was drawn had been authorised by Parliament through the Appropriation Acts. The plaintiff had no greater interest in the appropriation than any other member of the public.³³

Despite doubts as to the plaintiff's standing in this respect, members of the Court still went on to address the issue, further demonstrating that threshold issues of standing may not be terminal to a constitutional challenge of this nature. Gummow and Bell JJ, with whom French CJ³⁴ and Kiefel J³⁵ agreed, dismissed the plaintiff's contention after making a number of observations.³⁶ First, following *Pape*, it is now clear that the provisions of s 81 of the *Constitution*, for the establishment of a Consolidated Revenue Fund, and s 83, for parliamentary appropriations, do not confer a substantive spending power.³⁷ Second, in *New South Wales v Bardolph* ('*Bardolph*') it was held that the

³⁰ Ibid 531–2 [442]–[448].

³¹ *Appropriation Act (No 1) 2006–2007* (Cth); *Appropriation Act (No 3) 2006–2007* (Cth); *Appropriation Act (No 1) 2007–2008* (Cth); *Appropriation Act (No 1) 2008–2009* (Cth); *Appropriation Act (No 1) 2009–2010* (Cth); *Appropriation Act (No 1) 2010–2011* (Cth); *Appropriation Act (No 1) 2011–2012* (Cth).

³² *Williams* (2012) 288 ALR 410, 424 [39] (French CJ), 448–9 [117] (Gummow and Bell JJ), 460 [168] (Hayne J), 536 [475] (Crennan J), 563 [598] (Kiefel J).

³³ Ibid 497–8 [315]–[319] (Heydon J).

³⁴ Ibid 424 [39].

³⁵ Ibid 563 [598].

³⁶ Ibid 448–9 [114]–[117]. Hayne J also thought this question unnecessary to answer: at 460 [168]. While Heydon J agreed that the question did not arise, he nonetheless was inclined to state that *Appropriation Act (No 1) 2010–2011* (Cth) authorised the appropriation: at 501–2 [332]–[339]. Crennan J appeared satisfied that consecutive appropriations commencing from *Appropriation Act (No 3) 2006–2007* (Cth) were validly made: at 536 [474].

³⁷ See also *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169 [41] (French CJ, Gummow and Crennan JJ).

executive was not precluded from entering into contractual relationships in the absence of an appropriation.³⁸ It is an implied condition of such contracts that an appropriation will be made at some future point. Third, whether there had been a failure of a valid appropriation for the payments made to SUQ and therefore whether those payments could be recovered by the Commonwealth was not a subject of the dispute between these parties. Finally, any failure of a valid appropriation could be put right by a subsequent appropriation. On this basis, even if Mr Williams could establish that there had been a failure of appropriation, the consequence would not be that the Funding Agreement itself was invalid. Yet this was, as they said, ‘the focus of his case.’³⁹

IV SECTION 61 OF THE CONSTITUTION

A number of aspects of Commonwealth executive power were either not relied upon or quickly dismissed by the Court as a basis for the validity of the Funding Agreement and the payments made under it. It was clear that the case raised no issue as to the executive’s capacity to administer a Commonwealth department pursuant to s 64 of the *Constitution*.⁴⁰ Nor did it present any questions about the executive’s power to execute and maintain Commonwealth laws or its power to act pursuant to the prerogatives of the Crown.⁴¹ The majority also declared that this was not an instance of the executive exercising powers conferred upon it by statute.⁴² They rejected the submission of the Commonwealth that s 44 of the *Financial Management and Accountability Act 1997* (Cth) authorised its entry into the Funding Agreement and expenditure under it. Instead, it was held that the provisions of the Act were directed to the prudent conduct of financial administration and were not a source of power to spend.⁴³

The Court entertained some discussion of whether the case engaged the Commonwealth’s inherent authority derived from its status as the national government. However, all members of the Court were unanimous that this case was not an instance in which the so-called ‘implied nationhood power’ would permit Commonwealth executive action in the absence of statutory

³⁸ (1934) 52 CLR 455, 498 (Rich J), 509–10 (Dixon J).

³⁹ *Williams* (2012) 288 ALR 410, 448 [117] (Gummow and Bell JJ).

⁴⁰ *Ibid* 413 [4], 441 [83] (French CJ).

⁴¹ *Ibid*.

⁴² *Ibid* 437 [71] (French CJ), 446 [103] (Gummow and Bell JJ), 485–6 [260] (Hayne J), 551 [547] (Crennan J), 562 [596] (Kiefel J).

⁴³ *Ibid*. Heydon J did not find it necessary to consider this submission: at 522 [407].

authority.⁴⁴ In this respect, the facts were clearly distinguishable from the circumstances in *Pape*, where there had been a need for immediate fiscal action by the national government due to the global financial crisis; here there was no ‘natural disaster or national economic or other emergency’.⁴⁵ In addition, the states were quite capable of providing the services covered by the NSCP, as underscored by Queensland’s own funding scheme for school chaplaincy services under which SUQ was also receiving payments.⁴⁶ For some members of the majority there was, therefore, no justification for Commonwealth incursion into an area of state competency by executive action alone.⁴⁷ Instead, the determinative question was whether s 61 permitted the Commonwealth to enter into contracts and spend public money in circumstances where no authorising legislation had been enacted.

The Commonwealth made two primary submissions relating to s 61, which shall be referred to as the ‘broad submission’ and the ‘narrower submission’.⁴⁸ The broad submission was that the capacities of the executive were analogous to the juristic powers of an ordinary legal person, and were therefore effectively unlimited in scope insofar as they did not interfere with the legal rights and duties of others under the law. The narrower submission was that the scope of the executive power under s 61 extended at least to the subject matters of the express grants of legislative power in ss 51, 52 and 122 of the *Constitution*, whether or not legislation had been passed in support of the exercise of the executive power.

A Broad Submission

The broad submission was rejected essentially for two reasons. First, as a matter of general principle, the executive’s power to enter into contracts and spend money was found not to be analogous to the juristic powers of an ordinary person — an argument that Hayne J dismissed as ‘no more than a

⁴⁴ Ibid 441–2 [83] (French CJ), 456 [146] (Gummow and Bell JJ), 480–1 [240] (Hayne J), 520 [402] (Heydon J), 542 [503] (Crennan J), 562 [594] (Kiefel J).

⁴⁵ Ibid 456 [146] (Gummow and Bell JJ).

⁴⁶ Ibid 456 [146] (Gummow and Bell JJ), 468 [196] (Hayne J), 561 [591] (Kiefel J).

⁴⁷ Ibid 441–2 [83] (French CJ), 542 [501]–[503] (Crennan J), 562 [594] (Kiefel J).

⁴⁸ Although most members of the Court adopted the terminology ‘narrow submission’, this submission was confusingly referred to by French CJ as the ‘broad proposition’ due to the fact that it was an argument ‘that the executive power in *all of its aspects* extends to the subject matter of grants of legislative power to the Commonwealth Parliament’: *ibid* 419 [26] (emphasis added). See also Gummow and Bell JJ: at 451 [125].

particular form of anthropomorphism writ large.⁴⁹ Second, it was recognised that the executive's capacity to enter into contracts and spend is subject to federal considerations that can be derived from the text and structure of the *Constitution*.

In his seminal study of executive power under the *Constitution*, George Winterton observed that the nature of government action is inherently different to private action because the former 'inevitably has a far greater impact on individual liberties, and this affects its character.'⁵⁰ Frequently, the Commonwealth exercises powers of a governmental character when entering into contracts. As Crennan J accepted, the Commonwealth's capacities to contract and spend 'are capable of being utilised to regulate activity in the community in the course of implementing government policy.'⁵¹ Accordingly, executive contracts are increasingly perceived as a 'powerful tool of public administration.'⁵² French CJ concluded that the Funding Agreement, which followed the NSCP Guidelines, was made in a 'quasi-regulatory setting'.⁵³ This inhibited any broad analogy with the contractual capacity of ordinary juristic persons.

That money expended by the executive is public money was considered to be of fundamental importance.⁵⁴ The joint judgment of Gummow and Bell JJ highlighted that the law of contract has been developed primarily to regulate the interests of private parties.⁵⁵ So while the juristic capacities of the ordinary legal person might be relatively unconstrained, the contractual capacities of the Commonwealth executive necessarily need to be considered 'through different spectacles'.⁵⁶

Parliamentary control over executive expenditure is an example of a limitation particular to the Commonwealth capacity to contract and spend. Hayne J referred to Isaacs J's observation in *Commonwealth v Colonial*

⁴⁹ *Williams* (2012) 288 ALR 410, 470 [204].

⁵⁰ George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis*, (Melbourne University Press, 1983) 121, quoted in *Williams* (2012) 288 ALR 410, 424 [38] (French CJ).

⁵¹ *Williams* (2012) 288 ALR 410, 546 [521].

⁵² Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 4th ed, 2009) 65, quoted in *Williams* (2012) 288 ALR 410, 424 [38] (French CJ).

⁵³ *Williams* (2012) 288 ALR 410, 439 [77].

⁵⁴ *Ibid* 457 [151] (Gummow and Bell JJ), 474 [216] (Hayne J), 546 [518]–[519] (Crennan J), 558 [577] (Kiefel J).

⁵⁵ *Ibid* 457 [151].

⁵⁶ *Ibid*, quoting *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51 (Mason J) albeit in a different context.

Combing, Spinning and Weaving Co Ltd ('Wool Tops Case')⁵⁷ that parliamentary control extends not just to a power of appropriation but also to 'control over the actual expenditure of the sums appropriated.'⁵⁸ This had already been emphasised in *Pape*, where it was recognised that an appropriation by law is 'not by its own force the exercise of an executive or legislative power to achieve an objective which requires expenditure.'⁵⁹ Hayne J held that once it is accepted that Parliament can control expenditure not just by the mechanisms of appropriation but also through the enactment of specific legislation, it follows that the Commonwealth executive power to spend money must be 'limited by reference to the extent of the legislative power of the Parliament.'⁶⁰ Gummow and Bell JJ raised this inter-relationship in rejecting the attempt to define the contractual capacities of the executive arm of the Commonwealth in isolation from a holistic appreciation of the Commonwealth as a body politic. In particular, they emphasised that the executive does not possess 'a legal personality distinct from the legislative branch' of the Commonwealth,⁶¹ before concluding that 'considerations of constitutional coherence point away from the existence of an unqualified executive power to contract and to spend.'⁶²

In response to the broad submission, Hayne J expressed unease about the manner in which an unlimited executive power might interact with the incidental power in s 51(xxxix), which, among other things, enables the making of laws with respect to 'matters incidental to the execution of any power vested by this *Constitution* ... in the Government of the Commonwealth'. The Commonwealth qualified its broad submission by contending that the executive's capacity to spend was unlimited *unless and until Parliament otherwise provides*. Hayne J observed that, in the absence of a relevant enumerated head of power, one way Parliament might 'otherwise provide' was by enacting a law in reliance of the incidental power in s 51(xxxix).⁶³

He found that possibility troubling for a number of reasons. First — and on this Kiefel J agreed⁶⁴ — the operation of s 51(xxxix) in combination with an unqualified executive power would have the potential to significantly

⁵⁷ (1922) 31 CLR 421.

⁵⁸ *Ibid* 449, quoted in *Williams* (2012) 288 ALR 410, 479 [233].

⁵⁹ *Pape* (2009) 238 CLR 1, 72 [176] (Gummow, Crennan and Bell JJ).

⁶⁰ *Williams* (2012) 288 ALR 410, 484 [252].

⁶¹ *Ibid* 458 [154].

⁶² *Ibid* 458 [157].

⁶³ *Ibid* 480 [238].

⁶⁴ *Ibid* 559 [581].

expand the ambit of Commonwealth legislative power.⁶⁵ This repeated the concerns expressed in their joint dissent in *Pape*.⁶⁶ Second, as Heydon J observed in *Pape*,⁶⁷ an expanded Commonwealth legislative power would render the grant-making power under s 96 'otiose'.⁶⁸ Third, since legislation enacted under s 51(xxxix) is capable of demanding obedience, the consensual aspect of s 96, of which Barwick CJ spoke in *Victoria v Commonwealth* ('*AAP Case*'),⁶⁹ would be 'obliterated'.⁷⁰ This coercive potential might also enliven the federal considerations that formed the basis for Dixon J's judgment in *Melbourne Corporation v Commonwealth* ('*Melbourne Corporation*').⁷¹ There, Dixon J observed that Commonwealth legislative powers are broad and allow it to make laws that incidentally affect the operation of the states and its agencies. However, a law might still run the risk of falling outside the Commonwealth's legislative powers if it is intended to control, restrict or burden the states in a discriminatory fashion. Such a law is not authorised by the *Constitution* since it strikes at the conception of the states as bodies politic independent of their powers.⁷² In *Victoria v Commonwealth* ('*Second Uniform Tax Case*'),⁷³ Dixon CJ noted that such considerations did not apply to s 96 because it is a power that deals specifically with state finances and because it is not coercive in going only so far as to permit the making of grants and the attaching of conditions to those grants.⁷⁴ Hayne J's concern in *Williams* was that since a law enacted under s 51(xxxix) is capable of demanding obedience, unlike a grant under s 96, it could raise considerations of the federal structure of the *Constitution* as Dixon J contemplated in *Melbourne Corporation*.⁷⁵ This suggested that there must be some limit to the Commonwealth's authority to contract and spend beyond the need for a mere appropriation.

⁶⁵ *Ibid* 481 [242] (Hayne J).

⁶⁶ *Pape* (2009) 238 CLR 1, 119–20 [336]–[339] (Hayne and Kiefel JJ).

⁶⁷ *Ibid* 199 [569].

⁶⁸ *Williams* (2012) 288 ALR 410, 481–2 [243], [247] (Hayne J). Kiefel J also agreed on this point: at 562 [593]. See also Crennan J's concern about the potential of the Commonwealth's submission to permit 'the bypassing of s 96': at 542 [503]. Interestingly, Heydon J did not repeat this concern in *Williams*.

⁶⁹ (1975) 134 CLR 338, 357–8.

⁷⁰ *Williams* (2012) 288 ALR 410, 483 [248] (Hayne J).

⁷¹ (1947) 74 CLR 31.

⁷² *Ibid* 78–82 (Dixon J).

⁷³ (1957) 99 CLR 575.

⁷⁴ *Ibid* 609–10.

⁷⁵ *Williams* (2012) 288 ALR 410, 483 [248].

French CJ commenced his judgment by referring to Andrew Inglis Clark's observation that an essential and distinctive feature of a 'truly federal government' is the 'preservation of the separate existence and corporate life of each of the component States of the commonwealth'.⁷⁶ His federal concerns in relation to the broad submission were of a different order to that of Hayne J. French CJ was animated by the possible encroachment of Commonwealth executive power into areas of state executive competency, noting Alfred Deakin's observation that, generally, wherever Commonwealth executive power extends, that of the states is reduced correspondingly.⁷⁷ The Commonwealth submitted that since its executive actions did not interfere with or displace the laws of the states, those actions should not be unnecessarily restrained. However, French CJ held that while there may not have been any interference with the laws of the states, there were inevitable consequences for attributing such a wide power to the Commonwealth executive:

Expenditure by the executive government of the Commonwealth, administered and controlled by the Commonwealth, in fields within the competence of the executive governments of the states has, and always has had, the potential, in a practical way of which the court can take notice, to diminish the authority of the states in their fields of operation.⁷⁸

The impact of Commonwealth executive power upon the competencies of the states, as well as the potential for government contracts to have a regulatory effect, led French CJ to determine that the extent to which the executive's capacity might be viewed as in common with other legal persons was not 'open-ended'.⁷⁹

B *Narrower Submission*

The narrower submission suggested that the Commonwealth's executive power was at least coextensive with its legislative capacities. In other words, the executive could act in areas in which the Commonwealth legislature could validly pass legislation, without any requirement that such legislation had actually been enacted. Only five members of the Court considered this aspect of the Commonwealth's defence of the NSCP. While expressing concerns

⁷⁶ Ibid 412 [1], quoting A Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 12.

⁷⁷ *Williams* (2012) 288 ALR 410, 412 [1].

⁷⁸ Ibid 423 [37].

⁷⁹ Ibid 423–4 [38].

about the conclusions that might be drawn from prior High Court authority, Hayne J and Kiefel J did not consider it necessary to decide the question. Of the remaining members of the majority, French CJ, Gummow and Bell JJ, and Crennan J concluded, primarily on the basis of federal considerations, that, subject to certain exceptions, the Commonwealth executive was not empowered by s 61 to enter into contracts and spend public money in the absence of statutory authority.

Heydon J dissented on this point. From his perspective, the ‘breadth’⁸⁰ of the Commonwealth executive power extended to at least the subject matters of the enumerated heads of legislative power,⁸¹ subject to certain exceptions.⁸² The ‘depth’ of that power, or what the executive could do in the absence of statutory authority, was limited only by the fact that the executive cannot raise taxes,⁸³ the necessity to preserve rights and obligations created under state law,⁸⁴ and the preservation of the states as functioning governments.⁸⁵

For the members of the majority who considered it, the narrower submission raised three main federal concerns: (i) the potential for s 96 to be bypassed; (ii) a diminished role for the Senate, acting in its capacity as the ‘States’ House’; and (iii) an inability to resolve potential inconsistencies between Commonwealth and state activity.

The concerns of Gummow and Bell JJ⁸⁶ and Crennan J⁸⁷ that acceptance of the Commonwealth’s narrower submission might result in the ‘bypassing’ of s 96 bore a connection to the same sentiment expressed by Hayne J and Kiefel J in their discussions of the Commonwealth’s broader submission. Similarly influential in this context was the importance ascribed by Barwick CJ to the consensual operation of the provision in allowing Commonwealth activity in areas beyond those the subject of an express legislative grant. In the *AAP Case*, Barwick CJ said:

a grant under s 96 with its attached conditions cannot be forced upon a State: the State must accept it with its conditions. Thus, although in point of econom-

⁸⁰ For the origins of the concepts of ‘breadth’ and ‘depth’ of executive power, see *ibid* 515 [385] (Heydon J).

⁸¹ *Ibid* 502–3 [340]–[345], 520 [403].

⁸² *Ibid* 519–20 [397]–[401].

⁸³ *Ibid* 519 [398] (Heydon J).

⁸⁴ *Ibid* 519 [399].

⁸⁵ *Ibid* 520 [400].

⁸⁶ *Ibid* 455 [143].

⁸⁷ *Ibid* 542 [501], [503].

ic fact, a State on occasions may have little option, these intrusions by the Commonwealth into areas of State power which action under s 96 enables, wear consensual aspect.⁸⁸

Thus, while the practical realities of the fiscal imbalance between the states and the Commonwealth might force the former to accept s 96 grants, they are constitutionally free to refuse them. However, if the mechanism provided by s 96 is bypassed by direct Commonwealth executive spending, this consensual aspect to the extension of Commonwealth activity is altogether lost. As recognised by Hayne J and discussed above in Part IV(A), the potential undermining of the ‘consensual aspect’ of s 96 through reliance upon executive power might be exacerbated by Commonwealth reliance upon the incidental power in s 51(xxxix). In particular, while s 96 is not a coercive power and a grant made with respect to it cannot demand obedience,⁸⁹ legislation made in reliance upon s 51(xxxix) as incidental to the exercise of a wide executive power might include a coercive element.⁹⁰

The second major concern focused on the operation of the Commonwealth Parliament as an instrument of governance across the Federation. If an appropriation Act alone sufficed to authorise spending by the Commonwealth executive, then the scrutiny provided by the Senate, acting as a chamber designed to protect the interests of the states,⁹¹ would be circumscribed. This is because s 53 of the *Constitution* provides that the Senate has limited powers to deal with appropriation and taxation Bills. Such Bills cannot originate or be amended in the Senate.

Although acknowledging that contemporary party politics had long since deprived the Senate as having the character of a ‘States’ House’, French CJ maintained that the Senate is a necessary organ of Commonwealth legislative power and, constitutionally speaking, its role should not be undermined by an inflation of executive power.⁹² Heydon J, however, disputed that the Senate’s role in scrutinising executive spending would be diminished. He emphasised the ability of Senators to

⁸⁸ (1975) 134 CLR 338, 357.

⁸⁹ *Second Uniform Tax Case* (1957) 99 CLR 575, 610 (Dixon CJ).

⁹⁰ *Williams* (2012) 288 ALR 410, 483 [248] (Hayne J).

⁹¹ The Senate, or the ‘States’ House’, was an element of the tension between the exercise of executive power in a system of responsible government and a federal constitution with a bi-cameral legislature: *ibid* 431 [58] (French CJ).

⁹² *Ibid* 433 [60]–[61], although the limited role of the Senate in the appropriation process was also mentioned by Gummow and Bell JJ: at 454 [136], 456 [145].

seek information and criticise proposals to expend money ... through the Senate Estimates Committee, through correspondence with responsible ministers, through debate on Appropriation Bills, and through the questioning of ministers who are Senators, or their representatives, in the Senate.⁹³

While French CJ held that s 53 of the *Constitution* prevented the Senate from amending appropriation Bills,⁹⁴ Heydon J noted that nothing in the *Constitution* prevents the Senate from returning Bills to which s 53 relates to the lower house for amendment or from rejecting them altogether.⁹⁵ He also observed that there is nothing within the *Constitution* to prevent the Senate from initiating an ordinary Bill that could control executive expenditure otherwise authorised by an appropriation Bill.⁹⁶

Third, members of the majority reiterated a concern raised by the Attorney-General of Tasmania that within the *Constitution* there is no mechanism (akin to s 109 in respect of conflicting laws) for resolving inconsistency between state and Commonwealth executive action. If the Commonwealth's narrower submission was accepted and s 51 provided the scope of its executive power, potential existed for concurrent but inconsistent exercises of Commonwealth and state executive power on the same subject matter. Hence, Crennan J held that a wide view of the scope of the executive power could

hypothetically lead to the result that citizens caught by any inconsistency between a state legislature's regulation of chaplaincy services and the Commonwealth executive's acts in respect of the NSCP would be unable to avail themselves of the constitutional protection in s 109 against inconsistent legislation.⁹⁷

Heydon J, on the other hand, thought that the chances of conflict between Commonwealth and state executive power were 'reduced by the energy with which the Commonwealth has exercised its legislative powers to the exclusion of state laws.'⁹⁸ The Attorney-General of Tasmania's concern that there might be inconsistent executive action on the same subject matter could be resolved by the enactment of federal legislation and, where necessary, reliance on

⁹³ Ibid 518 [396].

⁹⁴ Ibid 433 [60].

⁹⁵ Ibid 518 [396].

⁹⁶ Ibid.

⁹⁷ Ibid 546 [522], with Gummow and Bell JJ agreeing: at 457 [152].

⁹⁸ Ibid 517 [393].

s 109.⁹⁹ For Heydon J, federal concerns were not absent from the narrower submission which, adopting an expression from the Commonwealth's outline of oral argument, he preferred to call the 'common assumption'. On the contrary, he stated that it

takes federal considerations into account in holding that Commonwealth executive power follows the contours of Commonwealth legislative power. Commonwealth legislative power, coupled with s 109, gives the Commonwealth a preferred position over the states in certain respects. But otherwise state executive power is not fettered by Commonwealth executive power.¹⁰⁰

1 *Precedent*

The Commonwealth's narrower submission was supported by comments made in the *AAP Case*. There, Barwick CJ declared that 'the executive may only do that which has been or could be the subject of valid legislation.'¹⁰¹ Less sweepingly, Gibbs J said, 'the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth.'¹⁰² Jacobs J, after stating that the exercise of the prerogative could fall within the powers of the executive under s 61, said of the prerogative: 'Primarily its exercise is limited to those areas which are expressly made the subject matters of Commonwealth legislative power.'¹⁰³ Mason J, whose opinion appeared to be most influential to the Bench in *Williams*, said:

Although the ambit of the [executive] power is not otherwise defined by Ch II it is evident that in scope it is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the *Constitution*.¹⁰⁴

He went on to describe those responsibilities as 'ascertainable from the distribution of powers, more particularly the distribution of legislative

⁹⁹ Ibid 517 [393]–[394] (Heydon J). In answer to the Attorney-General of Tasmania's submission that judicial review of executive action in the absence of authorising legislation would be limited since s 3(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) requires the impugned act to have taken place 'under an enactment', Heydon J observed that common law principles of judicial review could be invoked under ss 75(iii) or (v) of the *Constitution* or ss 30(a), 39B(1), (1A)(a)–(b) of the *Judiciary Act 1903* (Cth): ibid 517–18 [394].

¹⁰⁰ *Williams* (2012) 288 ALR 410, 518 [395].

¹⁰¹ *AAP Case* (1975) 134 CLR 338, 362.

¹⁰² Ibid 379.

¹⁰³ Ibid 405.

¹⁰⁴ Ibid 396.

powers, effected by the *Constitution* itself and the character and status of the Commonwealth as a national government.¹⁰⁵

Some members of the majority noted that the *AAP Case* was decided on the false assumption that the executive spending power was to be found in ss 81 and 83 of the *Constitution*.¹⁰⁶ As a result, the Court in the *AAP Case* wrongly focused on determining the meaning of the ‘purposes of the Commonwealth’ in s 81, rather than defining the scope and limit of executive power.¹⁰⁷ The *AAP Case* must now be read in light of *Pape*, where it was decided that the source of the executive spending power must be found somewhere other than ss 81 and 83.

French CJ and Gummow and Bell JJ took the view that Gibbs J and Mason J were speaking in negative terms.¹⁰⁸ Although the latter judges had said that public moneys could not be lawfully expended for purposes outside the legislative competence of the Commonwealth, this was not to be understood as affirming that money could be lawfully expended on any subject on which legislation might be passed. Crennan J noted that, in making his comments, Gibbs J was ‘[b]earing in mind that prerogative powers were not being discussed’.¹⁰⁹ On the other hand, Crennan J stated that Jacobs J, with the prerogative powers very much in mind, concluded that not every exercise of power by the Commonwealth executive requires statutory authority.¹¹⁰

Heydon J’s response to this point was that Barwick CJ, Gibbs J, Mason J and Jacobs J dealt only with the ‘breadth’ of the executive power (the matters that could be the subject of Commonwealth executive action) not the ‘depth’ of the executive power (whether or not the executive could act without statutory authority). They sought to demarcate the area beyond which the executive could not go, but they did not go as far as to suggest that this area had within it ‘islands of non-power’.¹¹¹ In Heydon J’s opinion, their comments demonstrated agreement that the Commonwealth’s executive power extended to those subjects on which it could legislate. Between the four opinions, the only ‘controversy was whether the power of the executive to act extended further’ to include powers which it was appropriate for a national government

¹⁰⁵ *Ibid.*

¹⁰⁶ *Williams* (2012) 288 ALR 410, 452 [128] (Gummow and Bell JJ), 465–6 [189]–[191] (Hayne J).

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* 420 [29] (French CJ), 452–3 [130]–[132] (Gummow and Bell JJ).

¹⁰⁹ *Ibid* 549 [539].

¹¹⁰ *Ibid.*

¹¹¹ *Ibid* 510 [368]–[369] (Heydon J).

to have.¹¹² He found that consideration of the latter issue, which had been seized upon by French CJ to declare that Mason J's opinion 'was no simplistic mapping of the executive power on to the fields of legislative competency',¹¹³ should not distract from what had been said about the significance of the distribution of legislative powers in understanding the scope of executive power. In this regard, the 'nationhood' dimension of executive power was clearly exceptional. In discussing the centrality of the legislative distribution of power to establishing the contours of executive power, Heydon J quoted a passage from Mason J in the *AAP Case* that has been endorsed by the High Court as recently as *Pape*:¹¹⁴

However, the executive power to engage in activities appropriate to a national government, arising as it does from an implication drawn from the *Constitution* and having no counterpart, apart from the incidental power, in the expressed heads of legislative power, is limited in scope. It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the *Constitution*, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government.¹¹⁵

On a different tack, Gummow and Bell JJ, thought the *AAP Case* could not stand for a proposition as wide as the narrower submission since many of the enumerated heads of power are ill-suited to executive action.¹¹⁶ As French CJ noted, the subject matters of legislative power are diverse and relate to activities, classes of persons or legal entities, property rights and status.¹¹⁷ For example, it is well-settled that taxation can only take place under authority of statute and many other enumerated heads of legislative power, including marriage and bankruptcy, are 'inapt for exercise by the executive.'¹¹⁸ Heydon J

¹¹² Ibid 510 [366] (Heydon J).

¹¹³ Ibid 420 [29] (French CJ).

¹¹⁴ (2009) 238 CLR 1, 50 [96] (French CJ), 117 [330], 124 [357] (Hayne and Kiefel JJ), 181 [519], 187 [533], 188–9 [537] (Heydon J).

¹¹⁵ *AAP Case* (1975) 134 CLR 338, 398, quoted in *Williams* (2012) 288 ALR 410, 508 [363].

¹¹⁶ *Williams* (2012) 288 ALR 410, 454 [135].

¹¹⁷ Ibid 423 [36].

¹¹⁸ Ibid 454 [135] (Gummow and Bell JJ).

stated that these examples, rather than being fatal to the Commonwealth's narrower submission, could be considered exceptions that merely narrowed the breadth of executive power.¹¹⁹

In support of his observations in the *AAP Case*, Mason J relied on two authorities:¹²⁰ the *Wool Tops Case*¹²¹ and *Commonwealth v Australian Commonwealth Shipping Board*.¹²² In *Williams*, the Solicitor-General of Queensland submitted that dicta by Isaacs J in the *Wool Tops Case* supported the plaintiff's position that Commonwealth executive action generally required statutory authority.¹²³ In particular, he relied upon the statement by Isaacs J that

the constitutional practice that the Crown's discretion to make contracts involving the expenditure of public money would not be entrusted to Ministers unless Parliament had sanctioned it, either by direct legislation or by appropriation of funds.¹²⁴

According to French CJ, this supported the proposition that s 61 did not confer power directly on the Commonwealth to make or ratify executive agreements.¹²⁵ Heydon J, however, was not convinced that the *Wool Tops Case* supported Queensland's position. He was of the view that, even if it did, the dicta in that decision was contradicted by many later judgments.¹²⁶

A number of Justices evaluated the significance of the decision in *Bar-dolph*.¹²⁷ In that case, an officer of the State of New South Wales had entered into a contract with the plaintiff for the insertion in a newspaper of advertisements for the New South Wales Tourist Bureau. The making of the contract had not been expressly authorised by legislation, however, provision had been made for 'Government advertising' in the Supply Acts and the Appropriation Acts for the relevant financial years. Shortly after the contract was entered into, there was a change of government. The new administration refused to pay for any further advertising in the newspaper, but the plaintiff

¹¹⁹ Ibid 519 [397].

¹²⁰ (1975) 134 CLR 338, 397.

¹²¹ (1922) 31 CLR 421.

¹²² (1926) 39 CLR 1.

¹²³ Transcript of Proceedings, *Williams v Commonwealth* [2011] HCATrans 199 (10 August 2011) 4436–657 (Mr Sofronoff).

¹²⁴ *Wool Tops Case* (1922) 31 CLR 421, 451 (Isaacs J).

¹²⁵ *Williams* (2012) 288 ALR 410, 435 [65].

¹²⁶ Ibid 516 [388].

¹²⁷ (1934) 52 CLR 455.

continued to insert the advertisements. Upon the expiry of the contract, the plaintiff brought a suit in the High Court against the State for recovery of the unpaid amounts. The Court held that the contract was binding on New South Wales and that a valid parliamentary appropriation was merely a condition of fulfilment of the contract.¹²⁸ That did not affect its validity. Dixon J, with whom Gavan Duffy CJ agreed,¹²⁹ observed that, '[n]o statutory power to make a contract in the ordinary course of administering a recognized part of the government of the State appears to me to be necessary'.¹³⁰ French CJ,¹³¹ Hayne J¹³² and Crennan J¹³³ acknowledged that *Bardolph* appeared to lend some support to the Commonwealth's position, with Hayne J observing that the case suggested that 'a polity may make at least some contracts without statutory authority'.¹³⁴ French CJ concluded, however, that the words used by Dixon J reflected a characterisation of state executive power to contract in relation to the administration of government departments — akin to that which the Commonwealth enjoys under s 64 of the *Constitution* — and was not authority for the existence of a power to contract at large under the executive power of s 61.¹³⁵ Additionally, one of the few points of consensus between French CJ and Heydon J in *Williams* was that the *Bardolph* case was of limited applicability since it concerned the exercise of state executive power and not the power of the Commonwealth executive government acting under ss 61 or 64 of the *Constitution*.¹³⁶

2 *Drafting History, Opinions and Commentaries*

French CJ recognised that the drafting history of s 61 gave support to the Commonwealth's narrower submission.¹³⁷ By 31 March 1891, the draft version of s 61 read:

The Executive power and authority of the Commonwealth shall extend to all matters with respect to which the Legislative powers of the Parliament may be

¹²⁸ Ibid 498 (Rich J), 509–10 (Dixon J).

¹²⁹ Ibid 493 (Gavan Duffy CJ).

¹³⁰ Ibid 508 (Dixon J).

¹³¹ *Williams* (2012) 288 ALR 410, 438 [74] (French CJ)

¹³² Ibid 473 [212] (Hayne J).

¹³³ Ibid 547–8 [525]–[532] (Crennan J).

¹³⁴ Ibid 473 [212].

¹³⁵ Ibid 438 [74].

¹³⁶ Ibid 440 [79] (French CJ), 516 [391] (Heydon J).

¹³⁷ Ibid 424 [40].

exercised, excepting only matters, being within the Legislative powers of a State, with respect to which the Parliament of that State for the time being exercises such powers.¹³⁸

Sir Samuel Griffith, speaking to the draft, confirmed that what was being proposed was that the Commonwealth's 'executive authority shall be co-extensive with its legislative power'.¹³⁹ Then in April 1891, Griffith proposed an amendment that he optimistically claimed covered 'all that is meant by the clause, and is quite free from ambiguity'.¹⁴⁰ The amended provision read in all relevant respects as s 61 does today: 'The executive power and authority of the commonwealth shall extend to ... the execution of the provisions of this constitution, and the laws of the commonwealth.'¹⁴¹ Lending further support to this view, in a 1902 legal opinion, Alfred Deakin, Attorney-General of the new Commonwealth, declared that 'the Commonwealth has executive power, independently of Commonwealth legislation, with respect to every matter to which its legislative power extends'.¹⁴²

However, French CJ concluded that, as amended, 'the clause did not, in terms or by any stretch of textual analysis, describe an executive power to do any act dealing with a subject matter falling within a head of Commonwealth legislative power'.¹⁴³ He assembled evidence to demonstrate that Griffith's assumption as to the meaning of the provision was not universally shared. For example, a remark by Andrew Inglis Clark in 1901 stands in sharp contrast to Deakin's opinion. Inglis Clark said:

It is evident that the legislative power of the Commonwealth must be exercised by the Parliament of the Commonwealth before the executive or judicial power of the Commonwealth can be exercised by the Crown or the Federal Judiciary

¹³⁸ John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 329.

¹³⁹ *Official Report of the National Australasian Convention Debates*, Sydney, 31 March 1891, 527 (Sir Samuel Griffith).

¹⁴⁰ *Official Report of the National Australasian Convention Debates*, Sydney, 6 April 1891, 778 (Sir Samuel Griffith).

¹⁴¹ *Ibid* 777.

¹⁴² Alfred Deakin, 'Opinion 107 (12 November 1902) — Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth' in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia: 1901–14* (Australian Government Publishing Service, 1981) vol 1, 129, 131.

¹⁴³ *Williams* (2012) 288 ALR 410, 427 [47].

respectively, because the executive and the judicial powers cannot operate until a law is in existence for enforcement or exposition.¹⁴⁴

French CJ concluded that there was little evidence to support the view that the framers of the *Constitution* ‘shared a clear common view of the working of executive power in a federation’¹⁴⁵ and, in particular, that s 61 supported executive acts undertaken without statutory authority in areas within the enumerated legislative powers of the Commonwealth.¹⁴⁶ The other members of the majority agreed, although for different reasons.¹⁴⁷

In arguing to the contrary, Heydon J presented an extensive literature review of primary and secondary material to demonstrate the existence of a commonly held assumption that Commonwealth executive and legislative powers are coextensive. In addition to the comments already noted, Heydon J also referred to statements by Attorney-General Littleton Groom and other framers of the *Constitution*, including H B Higgins, Sir John Forrest and Sir John Quick.¹⁴⁸ He also took the unusual step of cataloguing academic commentary on the *AAP Case*.¹⁴⁹ Heydon J argued that the general consensus among academic writers, stretching from Winterton writing in 1983 to a paper by Peter Gerangelos still forthcoming at the time of the *Williams* decision, was that the *AAP Case* confirmed that the breadth of Commonwealth executive power extended at least to the extent of Commonwealth legislative power.

¹⁴⁴ A Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 38, quoted in *ibid* 429 [50] (French CJ).

¹⁴⁵ *Williams* (2012) 288 ALR 410, 431 [56].

¹⁴⁶ *Ibid* 433 [60].

¹⁴⁷ Gummow and Bell JJ were of the view that the *AAP Case* did not support the width of the proposition contained in the Deakin opinion: *ibid* 451 [125], [127]. Crennan J warned that opinions expressed in ‘terms which are general, absolute or otherwise imperfect’ should not be taken to imply support for the Commonwealth’s narrower submission: at 550 [542]. Hayne J was of the view that, although *Pape* stood for the proposition that in some cases s 61 confers the power to expend public moneys, this did not entail acceptance of Deakin’s opinion: at 467 [194]. Kiefel J expressed doubt as to whether Deakin’s opinion accorded with the view held in the *Wool Tops Case* that authority derived from the *Constitution* or from Commonwealth legislation was required for the executive to enter into an agreement with a private company for the manufacture and sale of wool tops: at 555 [565]–[566].

¹⁴⁸ *Williams* (2012) 288 ALR 410, 506 [353]–[354].

¹⁴⁹ *Ibid* 512–15 [376]–[385].

C *The Corporations Power and the Benefits Power*

Hayne J and Kiefel J considered it unnecessary to reach a final conclusion on the narrower submission since, in their view, even if the executive power extended to any subject on which Commonwealth legislation *could* be passed, the *Constitution* did not in any event empower the legislature to enact a statute in support of the NSCP. The Commonwealth had argued that, once its narrower submission was accepted, federal legislative power with respect to corporations in s 51(xx) or student benefits in s 51(xxiiiA) provided a basis for the Commonwealth to enter into the Funding Agreement and make expenditure under it. Hayne J and Kiefel J rejected the Commonwealth's submission in relation to s 51(xx) on the basis that the NSCP Guidelines did not require that the entity providing the chaplains be a trading or financial corporation.¹⁵⁰ They also rejected the Commonwealth's submission on the benefits power. They held that a broad construction of the phrase 'benefits to students' gave s 51(xxiiiA) a wider operation than was intended in transforming it into a general power over education.¹⁵¹

As Kiefel J explained, the power is to provide benefits to students, not to provide general funding to schools. The word 'benefit' was therefore not to be read as encompassing every form of payment that might provide some advantage to a person who happened to be a student.¹⁵² Rather, it was to be read according to the meaning given by McTiernan J in *British Medical Association in Australia v Commonwealth* ('BMA Case')¹⁵³ and accepted in *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth*.¹⁵⁴ 'the payment of money for and on behalf of another to obtain the provision to that other of material aid in satisfaction of a human want.'¹⁵⁵ The only reference wider than 'benefits' in s 51(xxiiiA) is to 'medical and dental services'. If the word 'benefits' was congruent with the word 'services', then the use of 'services' next to 'medical and dental' would have been unnecessary.¹⁵⁶

¹⁵⁰ Ibid 488 [271]–[272] (Hayne J), 557–8 [575] (Kiefel J). Heydon J, for whom consideration of a hypothetical law was required given his acceptance of the Commonwealth's narrower submission, said that it was 'not necessary to deal with s 51(xx)': at 497 [314].

¹⁵¹ Ibid 490 [281] (Hayne J), 557 [572]–[573] (Kiefel J).

¹⁵² Ibid 557 [572]–[573] (Kiefel J).

¹⁵³ (1949) 79 CLR 201, 279.

¹⁵⁴ (1987) 162 CLR 271, 280.

¹⁵⁵ *Williams* (2012) 288 ALR 410, 489 [278] (Hayne J).

¹⁵⁶ Ibid 491 [284] (Hayne J).

Earlier, Hayne J stated, ‘if the test to be applied is whether the parliament had power to enact a law providing for the disputed payments it is necessary to identify the content of that hypothetical law with precision.’¹⁵⁷ The practical challenge presented by this task was significant. Indeed, this appeared to be a motivation for the majority’s rejection of the narrower submission.¹⁵⁸

Heydon J disagreed. He preferred the definition of ‘benefits’ given by Dixon J in the *BMA Case* which encompassed the provision of ‘money payments or the supply of things or services’.¹⁵⁹ Heydon J did not consider federal concerns a legitimate constraint on adopting an interpretation of this breadth. Specifically, he did not view the absence of an express Commonwealth legislative power in relation to education as being a sufficient reason to limit the generality that the phrase ‘benefits to students’ might otherwise admit.¹⁶⁰

V IMPLICATIONS

A Section 96

Beyond its obvious consequences for the scope of Commonwealth executive power, *Williams* raises a broader set of issues in regard to Australia’s federal system of government. The decision is unusual as it was a major loss for the Commonwealth on the construction of its power under the *Constitution*, and also because of the extent to which members of the High Court reasoned using federal considerations. The significance of federalism in this respect was most clear in the judgment of French CJ. He began his opinion by quoting Inglis Clark’s conception of ‘a truly federal government’, an ‘essential and distinctive feature’ of which is ‘the preservation of the separate existence and

¹⁵⁷ Ibid 486 [262].

¹⁵⁸ Ibid 423 [36] (French CJ). See also Gummow and Bell JJ: at 454 [137].

¹⁵⁹ Ibid 527 [428] (Heydon J), quoting *BMA Case* (1949) 79 CLR 201, 260 (Dixon J) (emphasis added).

¹⁶⁰ *Williams* (2012) 288 ALR 410, 527 [427]. In response to Victoria’s submission that the benefit of chaplaincy services did not benefit students as students, Heydon J responded that school students encounter numerous vicissitudes arising out of or closely connected with studies, and that the scheme was designed for the prevention or amelioration of those conditions generally suffered, as well as those that young people suffer by reason of their particular age. That the services provided also addressed the latter, or even those problems also faced by the broader school community, did not prevent them from being sufficiently in connection with the former to satisfy the definition of ‘benefits to students’ given by Dixon J in the *BMA Case*: at 529–31 [437]–[439].

corporate life of each of the component States of the commonwealth'.¹⁶¹ Such rhetoric, and the reasoning that followed, stands in sharp contrast to the refusal of a majority of the Court only a few years before in *New South Wales v Commonwealth* ('*Work Choices Case*')¹⁶² to apply such considerations in construing Commonwealth legislative power.

In this light, it is easy to view *Williams* as a victory for the states. Indeed, one newspaper report of the decision ran under the headline: 'Fundamental Rethink as States' Powers Affirmed'.¹⁶³ This reflected a view that a loss of power for the Commonwealth inevitably equates with a win for the states. Certainly a broad reading of federal legislative power may diminish the states' capacity to pursue their own policy objectives, and in this sense, the converse, a narrow reading of federal legislative power, may understandably be cast as a win for the states. However, this simple hydraulic relationship is far less apt as an explanation of the impact of the *Williams* decision regarding federal executive power. Indeed, viewing the decision as necessarily being a win for the states in Australia's federal system is a superficial and even misleading interpretation of the case.

It is far from clear that the *Williams* decision will lead to a shift of legislative, policymaking or economic power to the states. In part this is because the Commonwealth has, through its legislative response to the case,¹⁶⁴ signalled that it will strongly resist such a consequence. But it is also because, as the reasoning in the decision emphasised, a limited conception of the capacity of the executive power to support federal spending hardly precludes all avenues through which such expenditure may occur. In addition to s 61, the Commonwealth enjoys the capacity to expend moneys for any purpose via the states under s 96 of the *Constitution*. That provision permits the Commonwealth to make its financial assistance to the states subject to almost any condition, unlimited by subject matter.¹⁶⁵ It is thus possible that the effect of *Williams* will be to increase the Commonwealth's use of this mechanism to direct money to a specific end, particularly in areas outside its legislative competency.

¹⁶¹ Ibid 412 [1], quoting A Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 12.

¹⁶² (2006) 229 CLR 1.

¹⁶³ Peter Hartcher, 'Fundamental Rethink as States' Powers Affirmed', *The Sydney Morning Herald* (Sydney), 21 June 2012, 7. See also Dan Harrison and Michelle Grattan, 'School Chaplains Ruling May Shift Power to States', *The Age* (Melbourne), 21 June 2012, 1.

¹⁶⁴ See *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth).

¹⁶⁵ *Second Uniform Tax Case* (1957) 99 CLR 575, 605, 610 (Dixon J).

On its face, s 96 deals the states into the equation as the funds must first be accepted by them before reaching their ultimate destination. The terms of s 96 do not provide a legal means for the Commonwealth to compel the states to accept conditional grants. This has been repeatedly upheld by the High Court, including in *Williams*,¹⁶⁶ as the ‘non-coercive’ character of the s 96 power¹⁶⁷ which gives it a ‘consensual aspect’.¹⁶⁸ However, in practice, s 96 has frequently been used in a way that denies the states any real say over the underlying policy implemented by the expenditure, even where this intrudes into areas of state competency.¹⁶⁹ The reason for this is that the Commonwealth raises the majority of all government revenue through personal and corporate income tax and the Goods and Services Tax.¹⁷⁰ This means that it has a dominant fiscal position relative to the states and, as acknowledged by Barwick CJ in the *AAP Case* and cited by Gummow and Bell JJ in *Williams*, ‘in point of economic fact, a State on occasions may have little option’¹⁷¹ but to accept a Commonwealth grant with its attached conditions. The states may thereby be reduced to mere conduits for the Commonwealth’s expenditure.

In any event, the Commonwealth’s response to *Williams* demonstrates a reluctance to resort to the s 96 mechanism if some alternative approach can be employed. While s 96 may not grant the states much of a say in practice, it also has downsides for the Commonwealth. For example, it does not permit the federal government to act autonomously and bypass the states altogether. That diminishes the credit the Commonwealth might otherwise receive from the electorate for the expenditure. Additionally, using the states as a funnel for expenditure in a wide range of areas can introduce a further layer of administrative and governmental complexity. This may well increase the costs involved in managing programs and also reduce the federal government’s capacity to spend Commonwealth money flexibly and swiftly in response to political and other priorities.

So the Commonwealth’s response to *Williams* was not to embrace s 96, but instead to seek a more expedient path via the *Financial Framework Legislation*

¹⁶⁶ *Williams* (2012) 288 ALR 410, 456–7 [148] (Gummow and Bell JJ), 483 [248] (Hayne J), 542 [501] (Crennan J).

¹⁶⁷ *Second Uniform Tax Case* (1957) 99 CLR 575, 609–10 (Dixon CJ).

¹⁶⁸ *AAP Case* (1975) 134 CLR 338, 357–8 (Barwick CJ).

¹⁶⁹ Brian Galligan, ‘Fiscal Federalism: Then and Now’ in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds) *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 320, 320–2.

¹⁷⁰ *Ibid* 320.

¹⁷¹ *AAP Case* (1975) 134 CLR 338, 357, quoted in *Williams* (2012) 288 ALR 410, 456 [148].

Amendment Act (No 3) 2012 (Cth). Within seven days of the decision being handed down, this rescue legislation was passed with urgency through the Federal Parliament. Despite seeking to retrospectively validate over 400 diverse executive spending programmes, the legislation was enacted just one day after the amending Bill was first introduced. The Act seeks to remedy the potential constitutional vulnerability identified in some 5 to 10 per cent of all federal government expenditure.¹⁷² The schemes at risk after *Williams* were all those created and funded in the exercise of federal executive power absent any statutory underpinning.

There is considerable doubt as to whether the Commonwealth's legislative response to *Williams* could survive a challenge in the High Court.¹⁷³ However, if it does, the status quo, at least from a federal perspective, will largely be restored.¹⁷⁴ The states will remain bypassed. Even if it is found to be invalid, a further workaround might be proposed, or the Commonwealth might be forced to far greater reliance upon s 96 of the *Constitution*. But given the nature of the latter provision, it is questionable whether this would amount to any real shift in the relative powers of the Commonwealth and the states.

B Intergovernmental Agreements

Where *Williams* may have more of an impact upon Australian federalism is in how it affects the capacity of the Commonwealth to use its executive power in other areas, in particular with respect to intergovernmental agreements. This mechanism of cooperative federalism has been left largely unexplored by the High Court and commentators.¹⁷⁵ This may be because there is a widely held

¹⁷² Kelly and Berkovic, above n 1, 4.

¹⁷³ Senator George Brandis expressed a 'lack of confidence in the legal effectiveness' of the Bill as it passed through Parliament: Commonwealth, *Parliamentary Debates*, Senate, 27 June 2012, 4748 (George Brandis, Shadow Attorney-General). This sentiment was echoed by the Hon James Spigelman, who has described some parts of the Act as, in his opinion, 'unconstitutional': James Spigelman, 'Constitutional Recognition of Local Government' (Speech delivered at the Local Government Association of Queensland 116th Annual Conference, Brisbane, 24 October 2012) 14.

¹⁷⁴ Although the creation of a statutory basis for such expenditure may be thought to meet the concerns expressed by the *Williams* majority stemming from the principle of responsible government, it is arguable that, as a matter of substance, the way in which the legislation both sustains existing schemes en masse and provides authority for new ones to be established in future leaves a lot to be desired in terms of transparency and accountability.

¹⁷⁵ With some notable exceptions: see especially Cheryl Saunders, 'Intergovernmental Agreements and the Executive Power' (2005) 16 *Public Law Review* 294; Paul Kildea, Andrew

perception that intergovernmental agreements operate at least in part extra-constitutionally¹⁷⁶ since they are not generally provided for in the *Constitution*.¹⁷⁷ Yet, Chief Justice French has described extra-constitutional cooperative movements as reshaping the relationship between the Commonwealth and the states and ‘perhaps the most significant current development under Australia’s *Constitution*.’¹⁷⁸ Cheryl Saunders has also observed that

a very considerable proportion of government in Australia takes place in the exercise of executive power under the rubric of intergovernmental relations, largely by-passing the systemic procedures for political and legal accountability.¹⁷⁹

It seems important, therefore, that consideration be given to the source of the Commonwealth’s capacity to participate in intergovernmental agreements. Following on from *Pape*, the High Court’s decision in *Williams* provides a rare opportunity to explore the constraints that might operate on the executive’s capacity in this regard.

There is broad recognition that the Commonwealth executive power must extend to the making of intergovernmental arrangements.¹⁸⁰ In *PJ Magennis Pty Ltd v Commonwealth*, Dixon J was of the view that legislation scheduling certain intergovernmental agreements was, by virtue of those agreements:

a law with respect to a matter incidental to the execution of a power vested by the *Constitution* in the Government of the Commonwealth and was an exercise of the legislative power conferred on the Parliament by par (xxxix) of s 51.¹⁸¹

More explicit recognition was given by Mason J in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*:

Lynch and George Williams (eds) *Tomorrow’s Federation: Reforming Australian Government* (Federation Press, 2012).

¹⁷⁶ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 556 [54] (McHugh J).

¹⁷⁷ The exception to this general rule is s 105A of the *Constitution*, which provides for intergovernmental agreements dealing with state debts. Since that is a very specific power, it is not considered further in this article.

¹⁷⁸ Chief Justice Robert French, ‘Australia’s Constitutional Evolution’ (Speech delivered at John Fordham Law School Constitutional Law Master Class, Fordham Law School, 20 January 2010) 32.

¹⁷⁹ Cheryl Saunders, ‘The Scope of the Executive Power’ (Speech delivered at Senate Occasional Lecture, Parliament House, 28 September 2012).

¹⁸⁰ *R v Duncan* (1983) 158 CLR 535, 560 (Mason J). See also Saunders, ‘Intergovernmental Agreements and the Executive Power’, above n 175, 301.

¹⁸¹ (1949) 80 CLR 382, 410–11.

Of necessity the scope of the [Commonwealth executive] power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation. It is beyond question that it extends to entry into governmental agreements between Commonwealth and State on matters of joint interest, including matters which require for their implementation joint legislative action, so long at any rate as the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the *Constitution*.¹⁸²

In *R v Hughes*,¹⁸³ the High Court was required to consider whether a state law conferring powers on an officer of the Commonwealth was valid. The joint judgment suggested that the intergovernmental agreement, which formed the basis on which the state law was enacted, might be an example of the type of executive activity referred to by Mason J in the above passage.¹⁸⁴ It therefore appears uncontroversial that the Commonwealth executive has the power to participate in intergovernmental agreements. However, the source of that power, other than that contained in s 105A of the *Constitution* or as expressly provided for by statute,¹⁸⁵ remains unclear.¹⁸⁶

Two alternatives have been suggested by commentators as potentially providing the necessary authority.¹⁸⁷ The first is the so-called 'nationhood' aspect of the executive power.¹⁸⁸ The second is a general capacity of the

¹⁸² (1983) 158 CLR 535, 560.

¹⁸³ (2000) 202 CLR 535.

¹⁸⁴ *Ibid* 554–5 [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹⁸⁵ *Williams* (2012) 288 ALR 410, 413 [4] (French CJ).

¹⁸⁶ Saunders, 'Intergovernmental Agreements and the Executive Power', above n 175, 301.

¹⁸⁷ A third alternative was raised by Gummow and Bell JJ in dicta in *Williams*. They observed that the 'ordinary and well-recognised functions of the government of the Commonwealth include the Commonwealth entering into agreements with the states': *Williams* (2012) 288 ALR 410, 455 [141]. However, this observation is very difficult to align with their statement just two paragraphs earlier at 456 [139], that the ordinary and well-recognised functions of the government of the Commonwealth would include

the operation of the Parliament, and the servicing of the departments of state of the Commonwealth, the administration of which is referred to in s 64 of the *Constitution*, including the funding of activities in which the departments engage or consider engagement. (citations omitted)

Those activities appear to be of a fundamentally different character to agreements between the Commonwealth and the states on fiscal and regulatory matters affecting the nation as a whole.

¹⁸⁸ Saunders, 'Intergovernmental Agreements and the Executive Power', above n 175, 306.

executive analogous to its capacity to enter into contracts.¹⁸⁹ Significant doubt may be cast on the first option due to uncertainty surrounding the source and contours of the nationhood power. There is also a poor fit between the nationhood power and its application to intergovernmental agreements.

1 *Nationhood Power*

Seminal statements in support of a nationhood power are to be found in the judgments of Mason J and Jacobs J in the *AAP Case*. In words that became central to the decision in *Pape*, Mason J described the power as the Commonwealth executive's 'capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.'¹⁹⁰ This description originates from the implication that Dixon J found in *Australian Communist Party v Commonwealth* ('*Communist Party Case*') that the Commonwealth legislature, as a polity, must enjoy certain powers 'to protect its own existence'.¹⁹¹ It led Mason J to conclude that 'the Commonwealth enjoys, apart from its specific and enumerated powers, certain implied powers which stem from its existence and its character as a polity'.¹⁹² Anne Twomey has noted that Dixon J was referring in the *Communist Party Case* to a legislative power, not an executive power, and has suggested that any executive power implied on this basis differs little from the prerogative power of self-protection.¹⁹³ The reason that Dixon J may have thought it necessary to imply a power was that, at the time of the *Communist Party Case*, the scope of the prerogative in this respect had not yet been made clear by United Kingdom courts.¹⁹⁴

Jacobs J was of a similar view in the *AAP Case* that the nationhood power was derived from the prerogative powers of the Crown which were 'now exercisable by the Queen through the Governor-General acting on the advice of the Executive Council on all matters which are the concern of Australia as a nation'.¹⁹⁵ However, he also thought the power was necessary for the 'maintenance of this *Constitution*'.¹⁹⁶ The reference to prerogative powers suggests

¹⁸⁹ Ibid; Anne Twomey, 'Pushing the Boundaries of Executive Power — *Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 336.

¹⁹⁰ *AAP Case* (1975) 134 CLR 338, 397.

¹⁹¹ (1951) 83 CLR 1, 188.

¹⁹² *AAP Case* (1975) 134 CLR 338, 397.

¹⁹³ Twomey, above n 189, 332.

¹⁹⁴ Ibid.

¹⁹⁵ *AAP Case* (1975) 134 CLR 338, 405–6.

¹⁹⁶ Ibid 406.

that the nationhood power was intended by Jacobs J to be limited in scope to matters such as ‘external affairs, defence of the nation and the protection of national functions from domestic violence’.¹⁹⁷ It has also been suggested that Jacobs J’s reference to ‘maintenance of this *Constitution*’ does not add much to the scope of the executive power beyond the prerogative of self-protection.¹⁹⁸ Since the Commonwealth polity derives its very existence from the *Constitution*, it makes sense that, as a matter of self-protection, it possesses a power to guarantee the survival of that instrument and the institutions that it creates. However, there is nothing within the *Constitution* to suggest that anything more than this is required of or permitted to the Commonwealth in order to fulfil its maintenance function.

Despite the limited origins of both the Mason J and the Jacobs J formulations, they have spawned a multitude of different interpretations as to the scope of the nationhood power. The breadth of these often bears little resemblance to their source. In *Davis v Commonwealth* (*‘Davis’*),¹⁹⁹ after referring to Jacobs J’s formulation of the nationhood power with approval, Brennan J introduced the notion that it might be capable of being used for the purposes of the ‘advancement of the Australian nation’.²⁰⁰ His reason for extending the scope of the power in this way was that if Commonwealth executive power extended to protection against forces that would weaken the *Constitution*, it also must extend to the ‘advancement of the nation whereby its strength is fostered’.²⁰¹ That asserted corollary does not sit well with the limited origins of the power nor with Mason J’s express qualification of it as limited in scope so as not to enable the Commonwealth

to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government.²⁰²

In *Pape*, Gummow, Crennan and Bell JJ described the power in even more expansive and nebulous terms:

The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the

¹⁹⁷ Twomey, above n 189, 330.

¹⁹⁸ *Ibid* 331; Winterton, above n 50, 32.

¹⁹⁹ (1988) 166 CLR 79.

²⁰⁰ *Ibid* 110.

²⁰¹ *Ibid*.

²⁰² *AAP Case* (1975) 134 CLR 338, 398. See also Twomey, above n 189, 331.

scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the *Constitution* but in form today in Australia it is a power to act on behalf of the federal polity.²⁰³

This approach was forcefully criticised by Hayne and Kiefel JJ, who expressed concern that the power would become ‘self-defining’.²⁰⁴ In their view, a matter should not be capable of being brought within the breadth of the Commonwealth executive power merely because the Commonwealth has formed an opinion that it deals with a crisis or emergency of national concern or importance. Heydon J similarly cautioned against development of the power in a manner that would permit the Commonwealth to ‘elevat[e] its conduct into validity’.²⁰⁵

A similar critique was levelled at the broad approach to the nationhood power in *Re Wakim; Ex parte McNally*.²⁰⁶ In that case, Kirby J suggested that the impugned cross-vesting legislation possessed an ‘Australian rather than a local flavour’ and that it sought to

facilitate national co-operation and ‘co-ordination’ in response to the ‘complexity ... of a modern national society’. The Commonwealth, in its relationship with the States and Territories, is in a unique position to respond to the issues arising under the establishment of a national system of jurisdiction-sharing. It has done so for high national purposes.²⁰⁷

This approach was flatly rejected by Gummow and Hayne JJ.²⁰⁸ While they conceded that the Commonwealth’s legislative and executive powers must be understood against the backdrop of its establishment as the national polity, they held that characterising a set of circumstances as a response to the complexity of modern national society is to ‘use perceived convenience as a criterion of constitutional validity instead of legal analysis and the application of accepted constitutional doctrine’.²⁰⁹

These concerns are particularly relevant in the context of intergovernmental agreements and they cast significant doubt on whether it is possible to employ the nationhood aspect of s 61 as a source of executive capacity to enter

²⁰³ *Pape* (2009) 238 CLR 1, 89 [233].

²⁰⁴ *Ibid* 123 [353].

²⁰⁵ *Ibid* 190 [542].

²⁰⁶ (1999) 198 CLR 511.

²⁰⁷ *Ibid* 615 [223] (citations omitted).

²⁰⁸ *Ibid* 581–2 [125]–[126].

²⁰⁹ *Ibid* 581–2 [126].

into those arrangements. Chief Justice French has observed with concern that '[t]he recent history of cooperative federalism in Australia demonstrates a tendency to treat as national a range of issues which, not so long ago, would have been regarded as local.'²¹⁰ In some cases, Commonwealth participation might assist the expediency of brokering agreement between the states. However, such participation is not always necessary, at least in theory. In *Davis*, Brennan J noted that the qualification 'which cannot otherwise be carried on for the benefit of the nation' within Mason J's nationhood test invites

consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in cooperation with the States) to secure the contemplated benefit.²¹¹

Even if the broad interpretation of a power based on nationhood, as put forward by Gummow, Crennan and Bell JJ in *Pape*,²¹² gained acceptance, it is difficult to see how the many different varieties of intergovernmental agreements might be accommodated. While some intergovernmental agreements, such as those which formed the basis of the 'Economic Security Strategy'²¹³ and the 'Nation Building and Jobs Plan',²¹⁴ might objectively be seen as designed to respond to situations of emergency or crisis, the vast bulk of intergovernmental arrangements deal with either conditional transfers of revenue from the Commonwealth to states or coordinated jurisdictional efforts to achieve national legislative harmony²¹⁵ in relation to non-crisis-related regulatory issues. Neither of these types of agreements could find their source in a nationhood power, however broadly formulated.

2 *Analogy to Executive Contracts*

The alternative to the nationhood power is that the Commonwealth's executive capacity to participate in intergovernmental arrangements may be

²¹⁰ Chief Justice French, 'Australia's Constitutional Evolution', above n 178, 28.

²¹¹ (1988) 166 CLR 79, 111.

²¹² (2009) 238 CLR 1, 89 [233].

²¹³ *Ibid* 179 [516] (Heydon J).

²¹⁴ *Ibid* 180 [517] (Heydon J).

²¹⁵ Chief Justice Robert French, 'The Incredible Shrinking Federation: Voyage to a Singular State?' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 39, 47.

supported by something loosely analogous to its 'inherent' capacity to enter into executive contracts.²¹⁶ However, this is where *Williams* may have important ramifications, for it is unclear whether such a capacity continues to exist absent express legislative authority. Although French CJ stated that the case did 'not involve any conclusion about the availability of constitutional mechanisms, including conditional grants to the states under s 96 of the *Constitution* and inter-governmental agreements supported by legislation',²¹⁷ arguments relied upon by the majority in *Williams* to constrain executive power to contract and spend might equally apply to executive participation in intergovernmental agreements not supported by legislation.

Before a reasoned comparison can be made, it is first necessary to consider whether executive participation in intergovernmental agreements draws from the same aspect of the executive power as that which permits the Commonwealth's entry into executive contracts. Blackstone said that 'if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer.'²¹⁸ On the basis of this distinction, prior to *Williams*, it might have been concluded that the two capacities were of a fundamentally different character. On the one hand, it had been assumed by many that the Commonwealth executive capacity to enter into contracts was the same as that of an ordinary legal person.²¹⁹ On the other hand, the capacity to form and execute intergovernmental agreements is manifestly unique to governments. As Enid Campbell posited, '[t]here must be very few intergovernmental agreements the performance of which does not require the exercise of peculiarly governmental powers by at least one of the parties.'²²⁰

After *Williams*, the distinction can be set aside for two reasons. The first is that the Diceyan unified approach of executive power has gained ascendancy over Blackstone's dichotomy. Dicey was of the view that the prerogatives simply extended to '[e]very act which the executive government can lawfully

²¹⁶ Saunders, 'Intergovernmental Agreements and the Executive Power', above n 175, 306; Twomey, above n 189, 336.

²¹⁷ *Williams* (2012) 288 ALR 410, 413 [4].

²¹⁸ William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) bk 1, 232.

²¹⁹ See, eg, *Bardolph* (1934) 52 CLR 455, 475, where Evatt J held: 'No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects'. See also Enid Campbell, 'Commonwealth Contracts' (1970) 44 *Australian Law Journal* 14.

²²⁰ Enid Campbell, 'Suits between the Governments of a Federation' (1971) 6 *Sydney Law Review* 309, 322.

do without the authority of the Act of Parliament'.²²¹ Winterton thought the Blackstone approach was of limited utility,²²² and in *Williams*, French CJ noted that judicial references in the United Kingdom have preferred Dicey's definition on the basis that it is 'functional and modern in emphasizing residuality and parliamentary supremacy'.²²³ The second and more important reason that the Blackstone distinction is irrelevant in this context is that *Williams* has made very clear that when the Commonwealth executive is entering into executive contracts, and committing to the expenditure of appropriated public money, it is exercising a *governmental* function.²²⁴ On this basis, the aspect of the executive power being exercised by the Commonwealth in entering into intergovernmental agreements, being exclusively governmental, is not dissimilar to that which it is exercising when entering into contracts to spend.

There is a further criticism that might be directed to the cogency of the analogy between the two capacities. That is, intergovernmental agreements exhibit 'some but not all of the characteristics of a contract between the executive government and a private party, citizen or corporation'.²²⁵ Most obviously, unlike executive contracts, the vast majority of intergovernmental agreements are intended as non-binding political arrangements.²²⁶ Participation in them is therefore arguably a weaker form of Commonwealth executive activity than entry into legally binding executive contracts. Even when intergovernmental agreements have contained a mix of obligations, some political and some non-political, the High Court has abstained from holding the non-political elements legally binding.²²⁷

The unenforceable nature of intergovernmental agreements may, however, be less terminal for a reasoned comparison with executive contracts than might at first seem the case. This is for two alternative reasons. First, a distinction might be drawn between the *consequences* of entering into binding

²²¹ A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 425.

²²² Winterton, above n 50, 112.

²²³ *Williams* (2012) 288 ALR 410, 418 [25], quoting Margit Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25 *Oxford Journal of Legal Studies* 97, 104.

²²⁴ See, eg, *Williams* (2012) 288 ALR 410, 423–4 [38], 439 [77] (French CJ).

²²⁵ *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 166 (French CJ, Gummow and Crennan JJ).

²²⁶ See, eg, the agreement at issue in *South Australia v Commonwealth* (1962) 108 CLR 130, 148–9 (McTiernan J), 153–4 (Windeyer J).

²²⁷ *Ibid* 141, 148 (Dixon CJ).

contracts and non-binding agreements, and the *capacity* to do so. It is arguable that the former has little bearing on the latter. This is what led Gummow and Bell JJ in *Williams*, when rejecting the Commonwealth's broad submission, to make the following observation:

The assimilation of the executive branch to a natural person and other entities with legal personality was said by the Commonwealth parties to be supported by statements ... to the effect that s 75(iii) of the *Constitution* denies any operation of doctrines of executive immunity which might be pleaded to any action for damages in respect of a common law cause of action. The absence from the *Constitution* of doctrines of executive immunity assists those private parties who have dealings with the executive branch of government. Different considerations arise where the question is one of executive *capacity* to enter into such dealings.²²⁸

Second, and in the alternative, though the Commonwealth may not sue or be sued for the breach of a non-binding intergovernmental agreement, the force of the political arrangement is such that the parties are highly unlikely to depart from the agreed terms. Chief Justice French has observed:

Mixed jurisdictional cooperative schemes may appear to be fragile because they depend upon a consensus. But once in place, it is arguable, there is a ratchet effect. Once a topic has been designated as one of national significance, requiring a cooperative approach, it is difficult to imagine circumstances in which it becomes politically acceptable to the parties to go backwards and fragment responsibility for it.²²⁹

Thus, the practical reality of the context in which intergovernmental agreements are formed means that their non-binding status, although unquestionably real, may not necessarily impede drawing cautious parallels with executive contracts.

Some of the concerns raised in *Williams* to justify constraining Commonwealth executive capacity to contract and spend are equally applicable to the context of executive participation in intergovernmental agreements. One basis for such constraint was that executive contracts involve spending public moneys.²³⁰ At least for Hayne J, this aspect alone was sufficient to raise issues

²²⁸ *Williams* (2012) 288 ALR 410, 458 [155] (emphasis added).

²²⁹ Chief Justice French, 'The Incredible Shrinking Federation', above n 215, 63.

²³⁰ *Williams* (2012) 288 ALR 410, 457–8 [151] (Gummow and Bell JJ), 460–1 [173], 474 [216] (Hayne J), 546 [519] (Crennan J), 558 [577] (Kiefel J).

of responsible and representative government.²³¹ Hayne J's concern appeared to stem largely from the fact that appropriation alone is a weak form of parliamentary control. Public expenditure at the behest of the executive therefore calls for the greater scrutiny that comes with the passing of legislation.²³² It must be accepted that there is no ready application of this narrow concern to those intergovernmental agreements not involving financial outlay. However, it is a concern that, on its own, is difficult to square with the principle that the executive may spend public money freely and without legislative authority in the ordinary course of the administration of government departments. It is perhaps for this reason that other members of the majority framed their concern in a more nuanced fashion. In their view, the issue was that expenditure of public money is often made for a regulatory purpose²³³ and this renders executive contracts 'a powerful tool of public administration'.²³⁴ It is this element of executive contracting and spending that warrants parliamentary oversight.

Many intergovernmental agreements have a regulatory character or purpose, reflecting consensus between the Commonwealth and the states on matters of policy, often with the objective of achieving national consistency. Saunders has observed that '[m]any [intergovernmental] agreements are driven by financial considerations, reflecting the Commonwealth's fiscal dominance, while others are purely, or largely, regulatory in character'.²³⁵ The regulatory nature of intergovernmental agreements raises a familiar tension between Commonwealth executive action and legislative oversight. The passing of the National Vocational Education and Training Regulator Bills offers a recent and illustrative example.²³⁶ Following an agreement between the Commonwealth and New South Wales, the latter agreed to refer powers to the federal government. The terms of the referral, as agreed between the respective executives, were appended to the New South Wales Bills. The Commonwealth Parliament was informed that for the referral to survive, the

²³¹ Ibid 474 [216].

²³² Ibid 476 [222]–[223] (Hayne J).

²³³ Ibid 439 [77] (French CJ), citing Cheryl Saunders and Kevin Yam, 'Government Regulation by Contract: Implications for the Rule of Law' (2004) 15 *Public Law Review* 51, 52. See also Crennan J's judgment at 546 [520], with whom Gummow and Bell JJ agreed: at 457 [151]–[152].

²³⁴ *Williams* (2012) 288 ALR 410, 424 [38] (French CJ), quoting Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 4th ed, 2009) 65.

²³⁵ Saunders, 'Intergovernmental Agreements and the Executive Power', above n 175, 297.

²³⁶ See National Vocational Education and Training Regulator Bill 2010 (Cth), Vocational Education and Training (Commonwealth Powers) Bill 2010 (NSW), and associated Bills.

Bills before it for enactment could not be amended in any manner. Thus, the Commonwealth executive effectively bound Parliament, reducing its sovereign powers from deliberation and scrutiny to a binary decision of whether or not to pass the Bills.²³⁷ As French CJ warned in *Williams*:

The executive has become what has been described as ‘the parliamentary wing of a political party’ which ‘though it does not always control the Senate ... nevertheless dominates the Parliament and directs most exercises of the legislative power’.²³⁸

The concerns raised with respect to the regulatory nature of executive contracts appear equally applicable in the context of many intergovernmental agreements. If legislative control is viewed as warranted with respect to the former, the question arises, on what principled basis should it not also be required to authorise participation by the Commonwealth executive in agreements with the states where those agreements have a regulatory character?

We have earlier noted Hayne J and Kiefel J’s concern in *Williams* that an unlimited executive power with respect to expenditure may aid the expansion of Commonwealth legislative powers through the use of s 51(xxxix). The use of s 51(xxxix) to legislate for the execution of intergovernmental agreements may raise similar concerns. The execution of an intergovernmental agreement may require legislation to give it effect or to create offences that support its implementation. Since this would ordinarily be a matter incidental to the execution of executive power pursuant to s 61, s 51(xxxix) may provide a basis for such legislative activity. However, the operation of s 51(xxxix) in conjunction with an unchecked executive capacity to enter intergovernmental agreements on a range of subject matters, even beyond the enumerated heads of Commonwealth legislative power, has the obvious potential to ‘work a very great expansion in what hitherto has been understood to be the ambit of Commonwealth legislative power.’²³⁹ This possibility appears to have been obliquely suggested in *R v Hughes*.²⁴⁰ There, the majority referred to the potential of the underlying intergovernmental agreement to support the

²³⁷ This example and other challenging aspects regarding parliamentary oversight in the context of use of the referrals power in s 51(xxxvii) of the *Constitution* as a tool of intergovernmental cooperation are discussed in Andrew Lynch, ‘The Reference Power: The Rise and Rise of Placitum?’ in Kildea, Lynch and Williams, above n 175, 193.

²³⁸ *Williams* (2012) 288 ALR 410, 433 [61] (citations omitted).

²³⁹ *Ibid* 481 [242] (Hayne J).

²⁴⁰ (2000) 202 CLR 535.

enactment of incidental laws with the aid of s 51(xxxix).²⁴¹ However, they warned against concluding that ‘the Parliament may legislate in aid of any subject which the Executive Government regards as of national interest and concern’.²⁴²

To address these concerns, it could be argued that constraints should be applied to the width of the incidental legislative power in s 51(xxxix) rather than to the scope of the executive power in s 61. However, this was not the approach taken in *Williams*. Thus, the principles that limit the Commonwealth executive’s capacity to contract and spend may also produce limits upon its capacity to participate in intergovernmental agreements. The reasoning in *Williams* opens the door for the contention that specific legislative authority is required before the Commonwealth executive is empowered to enter into most types of intergovernmental agreements.

VI CONCLUSION

Williams has made clear that Commonwealth executive capacity to contract and spend is constrained in a manner that was not previously conceived. It is now apparent that the scope of the Commonwealth executive power is not coextensive with its legislative power. Aside from expenditure that falls within recognised exceptions, Commonwealth executive contracting and spending must now be authorised by the federal Parliament.

Beyond executive contracts, the decision in *Williams* may have important implications for Australian federalism. It is possible that the Commonwealth may employ alternative mechanisms, such as s 96 of the *Constitution*, to achieve its policy objectives. This is particularly likely where these objectives stand outside areas of federal legislative power. While the Commonwealth cannot legally compel the states to accept s 96 grants, the broader fiscal imbalance between the two levels of government means that states often have very little alternative but to do so. It is possible that the Commonwealth could therefore see this as an avenue through which it might avoid the immediate consequences of the *Williams* decision and continue to expand its influence into areas of state competency.

Williams also raises questions about scope of the Commonwealth executive’s capacity in other areas, particularly in the context of cooperative federalism. This case note has suggested that some of the concerns that

²⁴¹ *Ibid* 554–5 [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

²⁴² *Ibid* 555 [38].

justified imposing limitations on the executive capacity to contract and spend in *Williams* have importance with respect to the Commonwealth's capacity to participate in intergovernmental agreements. It is arguable that Commonwealth executive capacity to participate in many forms of intergovernmental agreement must now also derive its source in legislative authority.